UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

TIFFANY MAYNE **CIVIL ACTION NO. 02-CV-542-D-M2**

VERSUS

JUDGE BRADY

BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE AND AMELIA LEE

MAGISTRATE JUDGE NOLAND

****

MEMORANDUM IN OPPOSITION TO PARTIAL MOTION FOR SUMMARY JUDGMENT

MAY IT PLEASE THE COURT:

FACTS:

Plaintiff, Tiffany Mayne, was employed by defendant LSU as an Instructor in the Kinesiology Department. Throughout her employment with defendant LSU, she received annual evaluations by defendant LSU which characterized her work product as "outstanding" and "excellent". In addition, she was nominated for and received several University-wide awards and received, every year, outstanding evaluations from her students.

However, beginning in the Fall 2000 semester, Ms. Mayne became the victim of unlawful harassment, retaliation and reprisal.[1] Specifically, following Ms. Mayne's repeated complaints and reports to defendants concerning student athletes' papers she believed to have been plagiarized, on-

[1]Deposition of Tiffany Mayne, Exhibit A, pp. 237-238, 240-244, 248, 319, 359-360, 363-365, 370, 383-384, 387, 392

JJB

going situation of the student athlete class disruptions, class monitoring, grade changing, and harassment she was experiencing from the Academic Center for Students Athletes, defendant Lee told Ms. Mayne that she, Ms. Mayne, was the problem, that she needed to be on the "team", and that she needed to attend classes to improve her relations with the ACA and the football players.[2]

Ms. Mayne specifically and unquestionably reported the plagiarism to LSU, which did nothing. According to Kathy Hill, Ms. Mayne's direct supervisor who was immediately beneath Dr. Lee, Ms. Mayne reported the plagiarism to Lee in her presence.[3] In addition to the plagiarism, Ms. Mayne protested the university practice of obtaining banking information from LSU Foundation donors which was openly discussed and reviewed at fund-raising meetings. According to Hill, the donor lists should never have financial information on them.[4] Ms. Mayne repeatedly reported and protested the obvious preferential treatment afforded the male football players. In his deposition, LSU ACA employee, Carlos Thomas, testified repeatedly to the fact of preferential treatment of male football players at LSU. He, like Ms. Mayne, cited numerous examples the most egregious of which were changing of grades after they were finalized by the instructors and ACA employees typing papers for the football players - all of which he reported to LSU Administration.[5] Thomas, in his deposition, described the overt favoritism exhibited toward the male football players as "appalling"

---

[2]Deposition of Mayne, Exhibit A, pp. 150-151, 153-154, 156, 202, 219, 240, 279

[3]Deposition of Kathy Hill, Exhibit B, pp. 38-39, 43, 46-50.

[4]Deposition of Kathy Hill, Exhibit B, pp. 57-59

[5]Deposition of Carlos Thomas, Exhibit C, pp. 52-55, 6072-73, 77-80, 109, 139, 147, 152, 157-160, 172

and "like Romper room - elementary school like."[6]

By letter dated July 31, 2001, Ms. Mayne was advised by defendant that her contract would not be extended beyond May 24, 2002, in spite of her excellent performance evaluations and student evaluations. Ms. Mayne questioned Dr. Lee about the notice of non-renewal of her contract. Lee advised Ms. Mayne that the sending of the letter was "standard". However, Ms. Mayne advised Lee that she had never received such a letter in her entire tenure as an LSU employee.[7] In addition to Ms. Mayne's direct testimony that she had never received a notice of non-renewal in her nearly decade of employment at LSU, Thomas J. Karam, long-time LSU employee and former Director of the Academic Center for Athletes, also testified that he had never previously received a notice of non-renewal and was never aware of any other LSU employee receiving such notice as a "standard" practice.[8] Of course, this evidence is directly contradictory to that presented by defendants on summary judgment - a clear genuine issue of material fact.

Due to the escalating and intense pattern of unlawful harassment, retaliation, and reprisal, Ms. Mayne was actually and constructively removed from her continued employment at LSU as a result of plaintiff's complaints about various academic improprieties involving LSU student athletes which she reported to defendants. On January 15, 2002, Ms. Mayne was called into a meeting with Lee. Lee told her that she had a problem with the ACA and that she had to get along with the ACA. Lee also told her that she was due for her evaluation in April, 2002, and that her evaluation would

---

[6]Deposition of Carlos Thomas, Exhibit C, pp. 66-68

[7]Deposition of Mayne, Exhibit A, pp. 255, 384-385

[8]Deposition of Thomas J. Karam, Exhibit D, p. 46

not be good and that she needed to get on the "team".[9] Ms. Mayne left the Lee meeting devastated and distraught. On January 16, 2002, Ms. Mayne called in sick and sought medical attention resulting from the stress, anxiety, and associated physical symptoms arising from the escalating retaliation and fears that she would lose her employment.[10] On January 18, 2002, Ms. Mayne filed a report of injury/sickness and a doctor's excuse with LSU indicating the cause of her illness was "unethical practices" at LSU and her refusal to participate in "unethical practices" at LSU.[11] After Lee received the report, Ms. Mayne received a telephone call from Lee's secretary who advised her that Lee was trying to fire her.[12] Ms. Mayne was forced to take a medical leave of absence by defendant, requiring her to exhaust her sick leave and vacation time.[13] On January 24, 2002, Ms. Mayne received a telephone call from an LSU employee who advised Ms. Mayne that he had been told by various LSU employees that she was "crazy"; that she had been terminated from her employment; and that she had complained about "unethical practices" at LSU and that was why she was being terminated.[14] Thereafter, Ms. Mayne began receiving a series of telephone calls from other LSU employees reiterating this same information.[15] In addition, Ms. Mayne was advised that LSU's attorney had begun questioning persons regarding possible NCAA violations, and that during

---

[9]Deposition of Mayne, Exhibit A, pp. 150-151, 153-154, 156, 202, 219, 240, 279,

[10]Deposition of Mayne, Exhibit A, pp. 310-315, 393-398

[11]Deposition of Mayne, Exhibit A, pp. 313-315

[12]Deposition of Mayne, Exhibit A, pp. 319-320, 322

[13]Deposition of Mayne, Exhibit A, p. 326

[14]Deposition of Mayne, Exhibit A, pp. 334-335

[15]Deposition of Mayne, Exhibit A, pp. 328-329, 333-334

the questioning, LSU's attorney asked a series of questions about Ms. Mayne, like what kind of person was she, did they know she had mental problems, and what kind of family she came from.

Indeed, according to Kathy Hill, not only was Ms. Mayne clearly identified by the defendants as the whistle blower, but Dr. Lee directly told Hill that Ms. Mayne had "some sort of mental health deal".[16] Hill attested that part and parcel of Ms. Mayne's reports and protested conduct was Ms. Mayne's assertion that the male football players were "not supposed to be getting additional treatment beyond what the regular students [at LSU] do."[17]

Defendants LSU and Lee seek partial summary judgment on plaintiff's claims arising under state law. Defendant Lee does not seek nor is she entitled to summary judgment on plaintiff's claims arising under Federal law. In essence, the defendants contend the plaintiff is not entitled to relief against defendant LSU on her claims arising under La. R.S. 23:967 as, according to the defendant, she cannot show a violation of the law was reported by her. The defendants further contend that plaintiff cannot meet her burden of proof on her claims for intentional infliction of emotional distress, assault, and defamation. However, defendants' Motion should be denied entirely as genuine issues of material fact exist precluding the grant of summary judgment herein.

LAW AND ARGUMENT:

1. The Standard for Summary Judgment

Summary Judgment is granted only where there is no dispute as to any genuine issue of material fact. Credibility assessments are not permitted on summary judgment. In evaluating a motion for summary judgment, the Court must view the evidence in the light most favorable to the

---

[16]Deposition of Kathy Hill, Exhibit B, pp. 38-39, 43, 46-50, 90, 96-102

[17]Deposition of Kathy Hill, Exhibit B. pp. 100-101

non-moving party drawing all inferences in his favor. *Evans v. City of Bishop*, 238 F.3d 586, 589 (5th Cir. 2000). In *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000), the Supreme Court clearly emphasized the paramount role that juries play, stressing that in evaluating summary judgment evidence, courts must refrain from the making of "credibility determinations, the weighing of the evidence, and drawing of legitimate inferences from the facts," which "are jury functions, not those of a judge." *Fierros v. Texas Department of Health*, 274 F.3d 187, 190-191 (5th Cir. 2001).

2. Plaintiff's claims arising under La. R.S. 23:967

Boiled to its essence, defendant LSU's argument in response to plaintiff's claims arising under La. R.S. 23:967 is that Ms. Mayne cannot show a violation of law triggering her rights against reprisal. While acknowledging in brief that Ms. Mayne reported plagiarism, grade changing, preferential treatment of football players, participated directly in the investigation of same, and provided this information to a public body, defendant LSU contends that none of these matters constitute a "violation of law" within the meaning and intent of La. R.S. 23:967. However, the law remains contrary to the defendant's position.

First and most easily disposed of is defendant's erroneous contention that Ms. Mayne's rights trigger only on a violation of state law. The plain text of La. R.S. 23:967 belies defendant's contentions. La. R.S. 23:967 provides, in pertinent part:

> A. An employer shall not take reprisal against an employee who in good faith, and after advising the employer of the violation of law:
>
> (1) Discloses or threatens to disclose a workplace act or practice that is in violation of state law.
>
> (2) Provides information to or testifies before any public body conducting an investigation, hearing, or inquiry into any violation of law.
>
> (3) Objects to or refuses to participate in an employment act or practice that is in

violation of law.

Indeed, the plain language of La. R.S. 23:967 utilizes the term "state law" only in the context of subpart (1) of section A. Deliberately omitted from subparts (2) and (3) is the qualifier "state" law. Both subparts (2) and (3) clearly apply to "any" violation of law. Hence, under subparts (2) and (3) violations of both Federal and state law trigger protection against reprisal. This same result was reached by the Court in *Winkler v. Coastal Towing, LLC, et al.*, No. 2001 CA 0399, 823 So.2d 351 (La. App. 1st Cir. 2002). In *Winkler*, the Louisiana First Circuit approved a cause of action arising under La. R.S. 23:967 where the underlying "violation of law" arose under Federal law. In that instance, as in the case at bar, the employee objected or refused to participate in an employment act or practice which was in violation of Federal law, i.e., a sea captain who refused to engage in unseaworthy act.

Ms. Mayne contends she was harassed, forced onto medical leave, and terminated/constructively discharged on account of her refusal to participate in preferential treatment of LSU football players. The LSU football team is comprised entirely of males. Title IX expressly prohibits gender preference in higher education. Ms. Mayne clearly testified that she was personally aware of female athletes being treated differently than male football players.[18] Yet, in this instance involving male students, no disciplinary action was imposed. The very underpinnings of Title IX were violated by this conduct.

In its most recent pronouncement, the Supreme Court in *Jackson v. Birmingham Board of Education*, 125 S.Ct. 1497, 161 L.Ed.2d 361 (3/29/05), held that retaliation, even against a male girl's basketball coach, for his complaints and reports of gender inequity in education clearly violated

[18]Deposition of Mayne, Exhibit A, pp. 279

Title IX. Rejecting the argument that retaliation is not covered by Title IX, the Supreme Court held that the act of reporting and "whistle blowing" is squarely within the ambit of protection against gender discrimination in education:

> Retaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination encompassed by Title IX's private cause of action. Retaliation is, by definition, an intentional act. It is a form of 'discrimination' because the complainant is being subjected to differential treatment.
>
> *Jackson*, 125 S.Ct. at 1504

Further explaining, the *Jackson* Court held:

> Reporting incidents of discrimination is integral to Title IX enforcement and would be discouraged if retaliation against those who report went unpunished. . . But if Title IX's private right of action does not encompass retaliation claims, the teacher would have no recourse if he were subsequently fired for speaking out. Without protection from retaliation, individuals who witness discrimination would likely not report it, indifference claims would be short-circuited, and the underlying discrimination would go unremedied.
>
> *Jackson*, 125 S.Ct. at 1508

Ms. Mayne contends that her whistle blowing activities relating to the preferential treatment of male students, specifically LSU football players, triggers her rights against retaliation under Title IX and against reprisal under La. R.S. 23:967. The fact that Title IX serves as the trigger for protection under sub parts (2) and (3) as the "violation of law" in no way offends the precisely chosen language of La. R.S. 23:967.

It is additionally noted that defendant LSU has already been cast in judgment for discriminating against female students in violation of Title IX. Our Fifth Circuit in *Pederson v. Louisiana State University*, 213 F.3d 858 (5th Cir. 2000), reversed the grant of summary judgment to LSU based upon specific findings equally applicable to the case at hand. In particular, the *Pederson* Court sweepingly concluded:

> In addition to the district court's evaluation of LSU's attitudes as 'archaic', our independent

> evaluation of the record and the evidence adduced at trial **supports the conclusion that Appellees (LSU) persisted in a systematic, intentional, differential treatment of women.**
>
> *Pederson*, at p. 881
> (Emphasis added)

The Fifth Circuit further concluded:

> Appellees' outdated attitudes about women amply demonstrate this intention to discriminate, and the district court squarely found that LSU's treatment of women athletes was 'remarkably outdated', 'archaic', and 'outmoded.' . . **Well-established Supreme Court precedent demonstrates that archaic assumptions such as those firmly held by LSU constitute intentional gender discrimination.**
>
> *Pederson*, at p. 881
> (Emphasis added)

In short, the Fifth Circuit has concluded that LSU systematically discriminates against women and that it intentionally discriminates against women. The Fifth Circuit's indictment of LSU, its Board Members, and Administrators represents a judicial finding that LSU discriminates against women in violation of Title IX. This finding cannot be ignored by this Court.

The Court in *Pederson* readily and easily concluded that LSU clearly favored men's athletics over women's athletics citing to a dearth of evidence in the record. "The proper test is not whether it knew of or is responsible for the actions of others, but is whether Appellees intended to treat women differently on the basis of their sex by providing them unequal athletic opportunity, and, as we noted above, **we are convinced that they did**." *Pederson*, at 882 (emphasis added).

Ms. Mayne provided information to LSU - a public body - and objected to and refused to participate in the preferential treatment of male athletes at LSU.[19]

In brief, defendant repeatedly argues that it cannot be liable as Ms. Mayne cannot point to a violation of "state" law. Again, the violation of "state" as opposed to "any" law is found only in

---

[19] Deposition of Tiffany Mayne, Exhibit A pp. 116-120, 123-133, 135-151, 157-165, 167, 169-172, 189-191, 193-206, 210-220, 222-225, 246-247, 273-274, 293-294, 377-380

sub part (1) of La. R.S. 23:967. It is clear that defendant LSU takes the position that plagiarism, the existence of which is not questioned by LSU in brief, is not a violation of "state" law for the purposes of sub part (1) of La. R.S. 23:967. However, perhaps the defendant overlooked the fact that plagiarism is a crime in Louisiana. La. R.S. 14:73.2 makes it plain that plagiarism is a violation of Louisiana law:

> A. An offense against intellectual property is the intentional:
> (1) Destruction, insertion, or modification, without consent, of intellectual property; or
> (2) Disclosure, use, copying, taking, or accessing, without consent, of intellectual property.

As defined at La. R.S. 14:73.1(10), "'Intellectual property' includes data, . . . and confidential or proprietary information, in any form or medium, when stored in, produced by, or intended for use or storage with or in a computer, a computer system, or a computer network." Ms. Mayne testified, as did Ms. Owen and LSU's own representatives, that the plagiarism by the male football players occurred from the direct copying of an Internet article entitled "Bobsledding".[20] No credit to the author, nor permission for use from the author, was obtained by any of the male football players. In this state, that conduct amounts to an offense against intellectual property. Any "discriminatory" acts taken against Ms. Mayne for "disclosing or threatening to disclose" that workplace act or practice in violation of state law are actionable under La. R.S. 23:967A(1).

Buttressing the conclusion that the acts and practices opposed and reported by Ms. Mayne in this case are the provisions of La. R.S. 17:414.2B(1) which specifically provide that "a teacher's determination of a student's grade as a measure of the academic achievement or proficiency of the student shall not be altered or changed in any manner by any school official or employee." Although

---

[20]Deposition of Tiffany Mayne, Exhibit A pp. 194-195

contained in the Chapter relating to elementary and secondary education, this statute broadly encompasses any acts by "any" school official or employee to alter or otherwise change a grade assigned by Ms. Mayne or any teacher in Louisiana.

Defendant LSU additionally argues that Ms. Mayne cannot show that she suffered an "adverse employment action" on account of her whistle blowing activities. First, defendant's position is easily dismissed where, as here, Ms. Mayne's claims in this regard arise under La. R.S. 23:967 - as opposed to Title VII "retaliation." Unlike Title VII, La. R.S. 23:967 clearly defines "reprisal" broadly:

> C. For the purposes of this Section, the following terms shall have the definitions ascribed below:
>
> (1) 'Reprisal' **includes** firing, layoff, loss of benefits, or any discriminatory action the court finds was taken as a result of an action by the employee that is protected under Subsection A of this Section; . . .
>
> (Emphasis added)

Reprisal, afforded a non-exclusive and, instead, expansive definition, is not confined to "adverse employment action" often referred to in Title VII retaliation cases. In this case, Ms. Mayne shows that she was forced onto medical leave and ultimately forced from her employment at LSU as a result of her whistle blowing activities. [21] Most recently, the Supreme Court in *Pennsylvania State Police v. Suders*, 124 S.Ct. 2342, 159 L.Ed.2d 204 (June 14, 2004), affirmatively held that constructive discharge constitutes a "tangible employment action". In other words, the "discrimination" continues up through and including the constructive discharge. In this case, Ms. Mayne was constructively discharged from her employment. She was removed from the teaching schedule for the fall, 2002, and forced from her job.

---

[21] Deposition of Tiffany Mayne, Exhibit A pp. 382-384

The *Suders* Court expressly held:

> Beyond that, we hold, to establish 'constructive discharge,' the plaintiff must make a further showing: She must show that the abusive working environment became so intolerable **that her resignation qualified as a fitting response**. . . This affirmative defense [2-part affirmative defense to either liability or damages] will not be available to the employer, however, if the plaintiff quits in reasonable status or situation, for example, a humiliating demotion, extreme cut in pay, or transfer to a position in which she would face unbearable working conditions. . . This Court granted certiorari,. . . to resolve the disagreement among the Circuits on the question whether a constructive discharge brought about by supervisor harassment ranks as a tangible employment action and therefore precludes assertion of the affirmative defense articulated in *Ellerth* and *Faragher*. . . We conclude that an employer does not have recourse to the *Ellerth/Faragher* affirmative defense when a supervisor's official act precipitates the constructive discharge; absent such a 'tangible employment action', however, the defense is available to the employer whose supervisors are charged with harassment.
>
> *Suders,* 124 S.Ct. at 2349, 2350-51, (Emphasis added)

The *Suders* Court found that supervisor sexual harassment culminating in a constructive discharge violates Title VII and mandates the absence of the 2-part affirmative defense. In so holding, the Supreme Court clearly recognized the concept of constructive discharge as constituting a tangible employment action, i.e., a "discriminatory" action.

It is additionally noted, as recognized by the sole dissenter, Justice Thomas, the Supreme Court lowered the bar relating to constructive discharge:

> The Court has now adopted a definition of constructive discharge, however, that does not in the least resemble actual discharge. . . But, where the alleged constructive discharge results only from a hostile work environment, an employer is liable if negligent.
>
> *Suders,* 124 S.Ct. at 2358-9, Thomas, dissenting

On the question of whether constructive discharge, as alleged by Ms. Mayne, constitutes an act of "discrimination" under La. R.S. 23:967, it seems the Supreme Court has clearly answered in the affirmative. The Supreme Court concluded that constructive discharge - a "fitting response" to the situation in the working environment at hand - constitutes a "discriminatory" act. In this case,

enforced medical leave and culmination in the taking of the tangible employment action of constructive discharge easily satisfy the broad definition of acts comprising "reprisal."

3. Intentional Infliction of Emotional Distress

Defendant argues that the actions and deliberate inactions alleged by Ms. Mayne do not rise to the level required to prove intentional infliction of emotional distress. A plaintiff seeking to recover for intentional infliction of emotional distress must establish: (1) that the conduct of the defendant was extreme and outrageous; (2) that the emotional distress suffered by the plaintiff was severe; and (3) that the defendant desired to inflict severe emotional distress or knew that severe emotional distress would be certain or substantially certain to result from his conduct. *White v. Monsanto*, 585 So.2d 1205 (La.1991). The *White* Court held:

> The extreme and outrageous character of the conduct may arise from an abuse by the actor of a position, or a relation with the other, which gives him actual or apparent authority over the other, or power to affect his interest. . . A plaintiff's status as an employee may entitle him to a greater degree of protection from insult and outrage by a supervisor with authority over him than if he were a stranger.
>
> *White*, at 1209-1210.

In *White*, the Court acknowledged that this tort could occur in the workplace environment. Indeed, we noted that "[r]ecognition of a cause of action for intentional infliction of emotional distress in a workplace environment has usually been limited to cases involving a pattern of deliberate, repeated harassment over a period of time." *White,* at 1210. Additionally, an employer's **continued inaction** also has been held to give rise to a claim for intentional infliction of emotional distress. *Bustamento,* at 54; see also: *Brown v. Vaughn,* 589 So.2d 63 (La. 1991): combine all of the incidents together. An employer's repeated failure to take appropriate remedial measures constitutes intentional infliction of emotional distress. *Bustamento*, at 54, FN 15. The actions of LSU, through its agents

and employees, and those of Dr. Lee constituted outrageous behavior. Ms. Mayne became so ill as a result of this situation, she sought psychiatric assistance, is now taking anti-depressants, anti-anxiety medication, and disabled - the severity of her emotional distress is not challenged by defendant in its Motion.[22] All of Ms. Mayne's treating health care providers attested to both the severity of her emotional distress as well as its cause. Unanimously concluding that the situation in Ms. Mayne's working environment (specifically, according to Dr. Stewart the plagiarism issue as the trigger), each of her health care providers concurred that her return to any employment at LSU is entirely out of the question.

In addition to all of the evidence submitted herein, including that from Ms. Mayne who testified that the retaliatory situation in the working environment and the behavior of LSU and Dr. Lee caused her to seek and obtain treatment for anxiety, one need look no further as evidence of the deliberate inaction than that of March 8, 2002, and thereafter.[23] Ms. Mayne testified that she contacted LSU, through its counsel and HR Manager Caillier-Augustine, to again provide evidence relating to the academic improprieties and football coverup.[24] During that meeting, according to Ms. Mayne, she insisted that she be afforded absolute anonymity because of her legitimate fears that she would be the target of threats. However, less than one (1) week after receiving direct assurances that her identity and reports of misconduct would be held in the strictest confidence, she was publicly

---

[22]Deposition of Dr. Linda Stewart, Exhibit E, pp. 30-36, 41-45, 48; Deposition of Patricia Godfrey, Exhibit F, pp. 14-25, 31-42, 45-95; Deposition of Dr. Ghada Al-Asadi, Exhibit G, pp. 13-55. (ALL FILED UNDER SEAL PURSUANT TO PROTECTIVE ORDER)

[23] Deposition of Tiffany Mayne, Exhibit A pp. 310-311, 315, 393-398

[24] Deposition of Tiffany Mayne, Exhibit A pp. 156

targeted by LSU.[25] She was labeled a "troublemaker" who had a "sexual harassment" complaint and directly blamed for any and all woes which could befall the LSU football program. [26]

Ms. Mayne specifically, directly, and unequivocally advised LSU that she was legitimately in fear for her life if her whistle blowing activities were made known. Yet, in spite of a direct promise from LSU and its counsel, Ms. Mayne's identity was publicly disclosed by LSU when it knew and should have known she would instantly become a public pariah.[27]

In addition, Dr. Lee continually threatened Ms. Mayne that she could lose her job if she didn't "play ball", be on the "team", and ignore the blatant preferences afforded the men's football players.[28] Also according to Ms. Mayne, Dr. Lee and LSU went out of their way to label Ms. Mayne a trouble maker, a person with sexual issues, and "unstable."

It is clear that LSU deliberately acted to inflict emotional distress on Ms. Mayne and, in spite of her numerous protests and reports of illegal conduct, deliberately ignored them choosing, instead, to force her to leave her career. Similarly, Dr. Lee, charged with the ultimate responsibility over the Kinesiology Department at LSU, abused her position as Ms. Mayne's supervisor to threaten her employment and her life.

4. Defamation

Defendant argues that Ms. Mayne cannot meet her burden of proof relating to her claim of

---

[25] Deposition of Tiffany Mayne, Exhibit A pp. 314, 318, 370-372, 374-375

[26] Deposition of Tiffany Mayne, Exhibit A pp. 301-309 citation infra

[27] Deposition of Tiffany Mayne, Exhibit A pp. 332, 335-336

[28] Deposition of Tiffany Mayne, Exhibit A pp. 144, 150-151, 153-154, 156, 202, 219, 240, 279

defamation. However, even the jurisprudence cited by defendant supports the conclusion that Ms. Mayne was defamed. In its most recent pronouncement on defamation in Louisiana, the Louisiana Supreme Court in *Costello v. Hardy, et al.*, No. 03-C-1146, 864 So.2d 129 (La. 1/21/04), set forth the test for defamation as:

> Defamation is a tort which involves the invasion of a person's interest in his or her reputation and good name. Citations omitted. 'Four elements are necessary to establish a defamation cause of action: (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault (negligence or greater) on the part of the publisher; and (4) resulting injury.'
>
> *Costello*, at 139.

As a matter of law, words which by their very nature tend to injure one's personal or professional reputation, even without considering extrinsic facts or surrounding circumstances, are considered defamatory per se. *Costello*, at 140; *Kosmitis*; *Lemeshewsky*; citations omitted but stated in *Costello*, at 140. In this case, Ms. Mayne alleges that the defendants accused her of ruining the "institution" of LSU football, of having sexual issues, and being emotionally disturbed. These statements were not merely confined to the January, 2002, meeting between Dr. Lee and Ms. Mayne, rather they were deliberately spread throughout the media by LSU and throughout the LSU community. Given the public anger clearly focused at Ms. Mayne following the defendants' statements, it is abundantly clear that the defendants' intention was to injure Ms. Mayne's reputation and lower her standing in the community.

The Court in *Blackburn v. Gengelbach*, No. 2003-739, 873 So.2d 713, 716 (La. App. 1st Cir. 2004), clearly defined "defamatory words" as "those that tend to harm the reputation of another so as to lower the person in the estimation of the community, to deter others from associating or dealing with the person, or otherwise exposes a person to contempt or ridicule." Here, Ms. Mayne was

publicly accused of destroying the LSU "institution" of football. It is clear that the steadied purpose of the defendants was to cause Ms. Mayne to be held out for public ridicule and contempt. Following the initial disclosures by the defendants, Ms. Mayne was, indeed, the clear subject of public contempt and ridicule. Time after time, she was maligned by the public, including being labeled a whore by Ms. Hill's son on a radio show.[29] All of this occurred in spite of the direct assurances afforded her by the defendants' own counsel at the March 8, 2002, meeting that her identity and identifying information would never be disclosed.

Defendants also assert an entitlement to "qualified privilege." Alleging that the defamatory words were made "within the employer's walls", defendants contend that its statements merely concerned matters related to Ms. Mayne's job duties and performance. It remains a mystery how the defendants' repeated orders to Ms. Mayne to engage in illegal activity or lose her job and reputation constitute matters related to her job duties and performance. A "qualified privilege" can only exist if the statements are confined solely to the limited employment environment. It simply does not apply when, as here, the communications were made outside a one-on-one employee "counseling session." At the very least, if the privilege were applicable at some later stage in the litigation, it does not operate under the facts pleaded to bar all relief. Over and above the arguments set forth herein, any privilege exists only to "rebut the plaintiff's allegations of malice and places the burden of proof on the plaintiff to establish malice and lack of good faith." *Costello*, at 148, n. 18; *Smith v. Our Lady of the Lake Hospital*, 93-2512, 639 So.2d 730, 746-747 (La. 1994). In this case, the words alleged are clearly defamatory and proof of malice is not required in this instance. Hence, the

---

[29]Deposition of Kathy Hill, Exhibit B, pp. 94-95; Deposition of Ms. Mayne, Exhibit A, pp. 343-346, 348

privilege, even if available at law which it is not, is of no moment.

5. Assault

The only argument proffered by defendants in brief relating to Ms. Mayne's claim of assault is that she cannot show that "anyone" at LSU "made the threats against her." Defendants' argument misses the mark. Ms. Mayne contends, and the evidence shows, that not only did she directly tell the defendants she was afraid of physical harm if she were publicly identified as the football spoiler, but that is exactly what occurred. The tort of assault does not have, as an element, a requirement that the person committing the assault be also the person who would carry out the physical threat. It is no less actionable assault if a person tells another that he will hire a hit man. In this case, the defendants threatened not only Ms. Mayne's career, but used the public antagonism to the football whistle blower (which all parties acknowledge as real and do not dispute as palpable) to perpetuate the tort of assault. The threats of public disclosure were clearly made by the defendants with their full knowledge that the disclosure could easily lead to physical injury. Indeed, that is precisely what occurred. Immediately upon the defendants' disclosure of Ms. Mayne's identity as the whistle blower on LSU football, Ms. Mayne was subjected to numerous death threats and threatening phone calls.[30]

Even in the meeting on March 8, 2002, with LSU's counsel and its HR Manager, Ms. Mayne cited the examples of the house burning in Alabama against the Alabama football whistle blower as well as the physical injuries to the Minnesota basketball whistle blower. Yet, in spite of these facts,

---

[30]Deposition of Mayne, Exhibit A, pp. 337-339, 341

the defendants set the ball in motion knowing full well the consequences which would, and did, ensue.

6. Invasion of Privacy

In brief, defendants argue only that Ms. Mayne cannot sustain a cause of action for false light invasion of privacy. However, defendants do not seek summary judgment on plaintiff's claims relating to the disclosure of her medical information, specifically, that in conjunction with Ms. Mayne's forced medical leave in January, 2002. Indeed, Ms. Mayne contends that her privacy was invaded when the defendants openly discussed and shared her medical information.[31] That fact was verified by Kathy Hill. Ms. Mayne enjoys a clear and reasonable expectation of privacy in her medical information, including that which she provided the defendants in January, 2002. As defendants do not contest this aspect of Ms. Mayne's claims, summary judgment must be denied.

Turning attention to the only invasion of privacy claim on which defendants move for summary judgment, it is clear summary judgment is not appropriate. A cause of action for "false light invasion of privacy" is fundamentally different than invasion of privacy. False light invasion of privacy consists of three elements: 1) a privacy interest; 2) falsity or fiction; 3) unreasonable conduct. *Simpson v. Perry*, 2003 CA 116, 887 So.2d 14, 16 (La. App. 1st Cir. 7/14/04); *Perere v. La. TV Broadcasting Corporation*, 2000 CA 1656, 812 So.2d 673 (La. App. 1st Cir. 2001). This cause of action arises "from publicity that unreasonably places the plaintiff in a false light before the public." *Simpson*, at 16. In this case, Ms. Mayne contends that the defendants deliberately painted her in a false light before the public at large. She was labeled directly as the football whistle blower, the person responsible for attacking LSU football, a person with sexual issues, and mentally

[31]Mayne deposition, Exhibit A, pp. 318, 369

disturbed. Far from defendants' contention that the statements were "true", Ms. Mayne had not filed a sexual harassment complaint against LSU. Indeed, another female Kinesiology student had which triggered the events giving rise to the Caroline Owen litigation.[32] Similarly, Ms. Mayne was not, as publicly announced by LSU a "disgruntled, former employee" of LSU. Even according to LSU, Ms. Mayne was still on the payroll - albeit on forced medical leave. Finally, she was most certainly not the cause of dire ruin for the LSU football program. It is clear that the public disclosure in the press conference of Ms. Mayne's medical condition, i.e., that she had psychological issues, invaded her privacy and was clearly designed to place her in a false light before the public. Each of these statements were fiction and taken collectively were clearly and deliberately designed to discredit and abase Ms. Mayne before the community.

The *Perere* Court further elucidated the tort by defining the reasonableness component as "determined by balancing the plaintiff's interest in protecting his privacy from serious invasions with the defendant's interest in pursuing his course of conduct." *Perere*, at 676. In this instance, Ms. Mayne had a clear, expressed interest in maintaining her anonymity and privacy and further from not being labeled as the death knell for LSU football. The defendants, on the other hand, have articulated no legitimate interest in pursuing their course of conduct. Indeed, the only course of conduct which can be reasonably garnered from the defendants' conduct is that of discrediting Ms. Mayne personally and professionally and scaring off any other potential whistle blowers.

Summary judgment is plainly inappropriate on both claims of invasion of privacy and false light invasion of privacy.

---

[32] Petition in matter entitled "Caroline Owen versus Board of Supervisors of LSU, et al., Civil Action No. 02-407-C-M1, United States District Court for the Middle District of Louisiana, Exhibit H.

7. Abuse of Rights

In order to establish their claims for abuse of rights, the plaintiffs must show: 1) a right legally possessed; 2) asserted against another with the intention of harming or imposing a detriment upon another. *Lambert v. Maryland Cas. Co.*, 403 So.2d 739, 755 (La. App. 1981), affirmed 418 So.2d 553 (La. 1982). In assessing whether a person is liable unto another for abuse of rights, there must exist: 1) no benefit to the person exercising the legal right and 2) damage or injury to the person against whom the legal right is asserted. It is clear that genuine issues of material fact exists precluding summary judgment on the plaintiff's claim of abuse of rights.

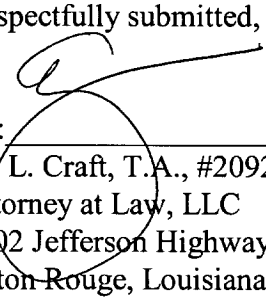
Specifically, while the defendants enjoy a right to supervise and even terminate their employees, they are precluded from so doing through threats, intimidation, and harassment. There existed no tangible benefit to the defendants in taking the deliberate actions taken against Ms. Mayne or, at the very least, a legitimate "benefit", which clearly caused damage and injury to the plaintiff.

CONCLUSION:

Genuine issues of material fact exist precluding the grant of summary judgment herein. Ms. Mayne did that which was both moral and her legal obligation to do. She reported illegal activity to her employer. Under ordinary circumstances, an employer might be grateful for the whistle blower. However, the circumstances present in this case are far from ordinary. However true the maxim that "doing what's right is not always popular, but it is always right", this case highlights both the dangers and perils associated with undertaking an unpopular trek. As a result of "doing what was right", Ms. Mayne lost her beloved career, her faith in an institution to which she had been loyal her entire life, her health, and her reputation. She was deliberately and in a very calculated manner held out as a public pariah, subjected to unimaginable ridicule and abuse, and her life forever

changed. The sad fact remains that all of this occurred merely on account of a game. As children we were all reminded by our parents that "it's just a game." In this game, however, the stakes were unbelievably high and the price immeasurable for Tiffany Mayne.

Respectfully submitted,



By: _____
Jill L. Craft, T.A., #20922
Attorney at Law, LLC
8702 Jefferson Highway, Suite B
Baton Rouge, Louisiana 70809
(225) 928-5353

CERTIFICATE OF SERVICE

The undersigned hereby certifies that I have served a copy of the above and foregoing upon trial counsel of record for all parties hereto via First Class United States mail, properly addressed with sufficient postage affixed thereto on this 8 day of July, 2005.

Baton Rouge, Louisiana, this 8 day of July, 2005.